

In re McGinnis, BAP No. OR-92-1604-JOR  
McGinnis v. McGinnis, Adv. No. 91-3315  
In re McGinnis, Case No. 386-05563-P11

9/27/93

Unpublished

Reversed

The bankruptcy court granted summary judgment for the debtor-in-possession on his claim to avoid a lien under 11 U.S.C. § 544(a). The bankruptcy court determined that the two year statute of limitations of 11 U.S.C. § 546(a)(a) did not apply to a debtor-in-possession because the time period does not start running until the entry of an order appointing a trustee. The BAP reversed, determining that under In re Software Centre Int'l, Inc., 994 F.2d 682 (9th Cir. 1993), the two year limitations period applied to debtors-in-possession.

# NOT FOR PUBLICATION

U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON  
FILED

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SEP 27 1993

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OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re	)	BAP No. OR-92-1604-JOR
	)	
LEW STEWART MCGINNIS, dba	)	BK. No. 386-05563-P11
LEW MCGINNIS CO.,	)	
	)	ADV. No. 91-3315
Debtor.	)	
	)	
KELLY MCGINNIS AND DANNY	)	
MCGINNIS,	)	
	)	
Appellants,	)	
	)	
v.	)	<u>MEMORANDUM</u>
	)	
LEW S. MCGINNIS AND	)	
MICHAEL R. MASTRO,	)	
	)	
Appellees.	)	

Argued and Submitted on February 17, 1992  
at Portland, Oregon

Filed - SEP 27 1993

Appeal from the United States Bankruptcy Court  
for the District of Oregon

Honorable Elizabeth L. Perris Bankruptcy Judge, Presiding

Before: JONES, OLLASON and RUSSELL Bankruptcy Judges.

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1 BACKGROUND

2 In the early 1980s defendant Lew McGinnis ("Lew") and  
3 Credit Finance, Inc.<sup>1</sup> owned a real property interest in land  
4 sale contracts known as the "Seattle Receivables". In July 1983  
5 Lew executed and recorded deeds of trust giving a security  
6 interest in all of his interest in the Seattle Receivables to  
7 his children, Kelly and Danny McGinnis ("Plaintiffs"). The  
8 trust deeds were recorded in the real property records, but no  
9 financing statements were ever filed with the Washington  
10 Department of Licensing as required by state law.

11 Thereafter Lew executed deeds of trust giving a security  
12 interest in all of his interest in the Seattle Receivables to  
13 defendant Michael R. Mastro ("Mastro"), who recorded the deeds  
14 of trust and filed financing statements with the Department of  
15 Licensing. On January 31, 1985, a subordination agreement was  
16 executed on behalf of the Plaintiffs subordinating their  
17 security interest to Mastro's security interest.<sup>2</sup>

18 On October 16, 1986, Lew filed for Chapter 11 protection  
19 listing the Plaintiffs as secured parties in the Seattle  
20 Receivables. Lew's Fifth Amended Plan of Reorganization was  
21 confirmed on July 13, 1990. No trustee was ever appointed in  
22 the case.

23 / / /

24  
25 <sup>1</sup>Credit Finance, Inc., is apparently closely held by Lew.

26 <sup>2</sup>This subordination agreement was redundant, since Mastro's  
interest was perfected, and the Plaintiffs' interest was not.

1       The Plaintiffs filed an adversary complaint based on waiver  
2 and estoppel seeking to invalidate the Mastro subordination  
3 agreement and to establish the priority of their own liens. The  
4 Defendants moved for summary judgment,<sup>3</sup> arguing that the  
5 Plaintiffs' liens were not properly perfected under Washington  
6 law and therefore avoidable by Lew as debtor-in-possession under  
7 § 544(a).<sup>4</sup> The bankruptcy court granted Lew's motion for  
8 summary judgment avoiding the Plaintiff's lien under § 544(a).  
9 The Plaintiffs appeal. We reverse.

#### 10                               STANDARD OF REVIEW

11       We review the granting of a motion for summary judgment de  
12 novo. E.g., In re Swanson, 36 B.R. 99 (9th Cir. BAP 1984).

#### 13                               DISCUSSION

14       The Plaintiffs argue that Lew's avoiding powers cannot be  
15 exercised because of the expiration of the two-year statute of  
16 limitations.

17       The Plaintiffs cite In re Johnson, 46 B.R. 167 (Bankr. E.D.  
18 Pa. 1985) for the proposition that Lew, as the debtor in  
19 possession, failed to comply with the two-year statute of  
20 limitations provision found in § 546.

21       The bankruptcy court found the § 546 statute of limitations  
22 applicable to trustees, but not to debtors-in-possession. She  
23

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24       <sup>3</sup>Each defendant filed his own respective motion for summary  
25 judgment. Mastro's motion was denied for lack of standing, and is  
not before this panel on appeal.

26       <sup>4</sup>Unless otherwise noted, all statutory citations refer to the  
Bankruptcy Code, 11 U.S.C. §§ 101 to 1330.

1 found the plaintiff's reference to Zilkha Energy Co. v.  
2 Leighton, 920 F.2d 1520 (10th Cir 1990), unpersuasive:

3  
4 Under the reasoning of Zilkha, if a trustee  
5 were appointed in Chapter 11 more than two years  
6 after the petition, he or she would be barred from  
7 commencing such actions even though the trustee had  
8 no prior opportunity to assert the claim. While the  
9 underlying Zilkha court suggests that such a  
10 scenario is distinguishable, the language of the  
11 statute provides no basis for such a distinction.  
12 Either the words, "after the appointment of a  
13 trustee," in section 546 also mean the creation of a  
14 Chapter 11 debtor-in-possession by virtue of a  
15 Chapter 11 order for relief or they do not. I  
16 believe that they do not.

17 \* \* \*

18 I, therefore, conclude that the statute means  
19 what it says, and the limitation period in section  
20 546 does not start to run until the entry of an  
21 order appointment [sic] a trustee. Since no trustee  
22 has been appointed in the case, Kelly and Danny are  
23 not entitled to prevail as a matter of law in their  
24 statute of limitations defense.

25 Trustees are distinct entities from debtors-in-possession,  
26 the latter concerned with rehabilitating the company with a  
confirmable plan while the former is concerned with obtaining  
the maximum return for creditors. In re Hunt, 136 B.R. 437,  
447-448 (Bankr. N.D. Tex. 1991). Although we might otherwise  
agree with the bankruptcy court's reasoning, a recent Ninth  
Circuit case holds that the statute of limitations also applies  
to debtors in possession. In re Software Centre Int'l, Inc.,  
994 F.2d 682 (9th Cir. 1993).

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